

A Tribal Perspective on Traditional Cultural Property Consultation

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For tribes, accomplishing consultation on traditional cultural properties is neither easy nor simple. Because the entire legal, regulatory, and guideline framework is a non-Indian construct it is often difficult to fit the needs of the developer and agency with the needs of the tribe. In this paper we briefly outline a tribal perspective on the consultation process, with particular reference to the Zuni experience over the past two years.

Zuni traditional cultural property consultations have covered numerous projects, including developments on Navajo Nation lands, pipelines and roads on various federal lands, a wastewater pipeline line through the Pueblo of Zuni National Historic Register District, the effects of the Glen Canyon Dam operations through the Grand Canyon, major federal water development projects, and a proposed coal mine covering approximately 35 square miles of federal, state, and private lands. Some of these consultations are completed, while others remain ongoing. Our experiences on these projects have been varied. As may be expected, we have encountered differing degrees of enthusiasm for the consultation process from different segments of the federal government, the state, and the private sector. While some developers and agencies have been exceptionally proactive and very supportive of tribal consultation, the lack of communication from some agencies and developers makes us wonder whether they are even aware of the need for consultation about traditional cultural properties.

In this paper we have chosen to concentrate our discussion on traditional cultural properties consultation under the National Historic Preservation Act. We do not address the multitude of issues raised by consultation under the Native American Graves Protection and Repatriation Act, the Archaeological Resources Protection Act, and the American Indian Religious Freedom Act.

Initial Issues at Zuni With Respect to the Consultation Process

At Zuni any consultation regarding traditional cultural properties requires that western concepts be introduced into the Zuni community, a community that holds nonwestern traditional, cultural, and religious values. For communities with nonwestern world views such an introduction of western values into fundamentally traditional parts of the culture can be quite threatening. Even the term "property," albeit a necessity of terminology

because of the language in federal law and guidelines, can raise serious concerns within the traditional and religious leadership.

When the concept of consultation over traditional cultural properties was first introduced at Zuni a number of serious issues immediately arose. Who should consult for the tribe? Here a major difference in information and decision-making structures between the agencies and the tribe was clearly identified. Agencies, working in the standard hierarchical western organizational mode, began consultation by sending a letter to the elected Tribal Governor and Council. The tribe, working in its nonwestern nonhierarchical organizational mode was faced with a quandary. While the elected Tribal Governor and Council have the authority to interface with non-Zuni agencies, the power to make decisions regarding traditional, cultural, and sacred issues lies with the religious leadership, from whom, on these issues, the elected tribal officials take direction. The question faced by the Tribal Council was, who in the religious leadership do we contact?

Resolving the matter of who to approach in the religious leadership at Zuni is not easy. There is no authority for religious leadership vested in any one person, nor even in any one group of individuals. Like the structure of Zuni society, the religious structure of the tribe is such that esoteric knowledge is spread among a large number of groups and people, including six kivas, fourteen medicine societies, and a number of clans and priesthoods. Even within each of these groups knowledge is spread among its members. Thus, for example, the rain priests all have general knowledge about water and water sources, but specialized knowledge of water and water sources in different geographic areas is divided among them (e.g., North, South, East, West, etc.). Consequently, in order to consult about water concerns as traditional cultural properties in any specific geographic area, the appropriate individual within the rain priest hood must be identified. Consultation with any other rain priest will be inadequate. To help simplify the issue of consultation within the religious leadership the tribe has formed a cultural resources advisory team, a topic we discuss below.

Another issue that immediately arose from the consultation process, and one that is still not yet resolved, is the question of consultation time frames. Again we find ourselves in a classic clash of world views over a fundamental concept. Agencies are locked into the regulatory process and have anticipated time frames for every consultation. To developers, of course, time is money, and this translates directly into pressure to conclude the consultation process as efficiently as possible. To Zuni religious leaders, however, time reckoned as days or dollars is not relevant to the issue of consulting about the traditional and cultural values of the tribe. In issues where the past, the present, and the future are all contemporaneous how can a time frame be put on consultation? In addition, if certain religious leaders are occupied for days or weeks in performing their sacred obligations for the welfare of the community they cannot break these obligations to consult with an agency. The time frame of the agency may be completely preempted by the obligations of the very individuals who must be consulted to adequately fulfill that agency's needs.

Mechanisms For Consultation At Zuni

Zuni is fortunate in that, even before traditional cultural properties consultations began, it already had a Tribal Archaeology Program that could act as a culture broker between the tribe and the outside agencies and project sponsors. The Archaeology Program already had over fifteen years experience working with religious leaders and various Tribal Councils on issues such as the repatriation of the War Gods and a series of law suits including the land claims, land damages, access to *Koluwala:wa*, and the water rights cases. In this respect Zuni found itself in a somewhat advantageous situation when faced with traditional cultural property consultations. Even so, these consultations required the tribe to develop a new and innovative approach to this challenge.

When requests for traditional cultural property consultations became a regular occurrence at Zuni, the tribe decided that it must establish a formal mechanism to accommodate its needs and the needs of federal agencies. To this end a meeting of religious leaders was called at the *Suski:kwa*, or Coyote House. More than 75 religious leaders attended this meeting. A number of topics were discussed, including the reasons for consultation and the Section 106 process, and the need for agencies to gather potentially confidential information. The coordination of information gathering, confidentiality, and dissemination were of major concern to the religious leaders. In addition, the relationship between the religious leaders and the elected Tribal Council in this regard had to be clarified in order to establish how the tribe would communicate with outside agencies.

The result of this and subsequent meetings was the formation of the cultural resources advisory team. A cultural preservation coordinator was selected to coordinate the activities of the advisory team and act as the point of contact between the advisory team and outside agencies and between the advisory team and the Tribal Council. The cultural preservation coordinator is a full-time position within the Zuni Archaeology Program.

The current advisory team consists of religious leaders holding the following positions; *Komosona* (the leader of the Rain Dancers), *Bi:la:shiwani* (a Bow Priest), *Kopekwini* (the leader of all six kiva groups), and *Kopekwini ts'ana* (alternate for the leader of all six kiva groups), *Koyemshi* (a Mudhead society member), *A:lu:na: kwa* (the messenger of the kivas), and an ex-officio member from the Tribal Council who acts as a liaison between the advisory team and the Tribal Council. Each of the religious leaders on the advisory team was chosen because of his roles and responsibilities within the religious leadership as a whole, and his broad knowledge of the religious structures at Zuni. The selection of these leaders was designed to provide the tribe with the most effective means of internally disseminating and gathering information.

In the Tribal Council Resolution formally establishing the advisory team, the Council approves of the advisory team working with the Zuni Archaeology Program. The Council also approves the advisory team working with project sponsors, land-managing agencies, State Historic Preservation Officers, Tribal Historic Preservation Officers, and other officials to gather and

assess information, to identify the appropriate religious leaders with knowledge or concerns about any particular project, to discuss this information and gather advice from the appropriate religious leaders, and then relay this information and advice to the Zuni Archaeology Program for the purpose of making recommendations regarding traditional cultural properties.

The roles and responsibilities of the cultural resources advisory team and the relationships of the advisory team with the Tribal Council, the cultural preservation coordinator, and the Zuni Archaeology Program are specified in another Tribal document approved by the Tribal Council entitled "Pueblo of Zuni Cultural Resources Advisory Team, Roles and Responsibilities." In this document the cultural preservation coordinator is identified as the official coordinator and liaison between the advisory team and project sponsors, between the advisory team and non-Zuni agencies, and between the advisory team and Zuni agencies.

When a consultation request is received at Zuni it is sent to the cultural preservation coordinator, who reviews the request and determines whether or not the information provided with the request is adequate for consultation. Should more information be needed from the agency the coordinator makes this request directly to the agency. For example, requests are often received that specify the area and nature of the undertaking but do not include the report and site forms generated as a result of the archeological survey. We have found that, in order to adequately provide consultation, a review of the archeological documentation is a necessary prerequisite for traditional cultural property consultation.

Once the information has been reviewed by the coordinator, he then calls a meeting of the advisory team to discuss the documentation and what steps should be taken next. Typically the advisory team then consults with the appropriate religious leaders concerning the project. They then schedule a field visit to the project area to determine the presence or absence of traditional cultural properties and assess the importance of any properties to the tribe's historically rooted beliefs, customs, and practices.

At the conclusion of fieldwork the coordinator and the anthropologist, if an anthropologist is working for the tribe on the project, will put the advisory team's identifications, assessments, and recommendations on paper. This document is then given to the advisory team for their review and editing to ensure that their concerns are adequately represented, and that no confidential information is released to non-Zunis. After any necessary changes are made, the coordinator submits the report and recommendations to the Tribal Council for their review. If the Tribal Council agrees with the report and recommendations, the Governor signs a Certificate of Approval and Release for the report at which time it is released to the agency.

Confidential information that may be collected during consultation, but cannot be released to non-Zunis, is kept in restricted files at the Zuni Archaeology Program. These records as well as other records generated Zuni during the project, remain the real and intellectual property of the tribe and can only be accessed by initiated

(*Othole*—continued from page 43)

tribal members. They may not be copied in any form without the written permission of the advisory team.

To date we have found that the newly developed internal process works well for the tribe. There have already been a number of situations where traditional cultural properties have been protected as a result of advisory team consultations. What works for Zuni, however, may or may not work for other tribes.

The Advantages and Disadvantages of Consultation for Zuni

We realize that the specifics of traditional cultural properties consultation are still evolving, and that any system presently in place will continue to undergo changes. The tribe is pleased that National Register Bulletin 38 is being followed by agencies and that the recent amendments to the National Historic Preservation Act provide added authority for the assessment of traditional cultural properties. In addition, recently proposed amendments to the American Indian Religious Freedom Act regarding the protection of sacred sites important to Indian tribes, if enacted into law, will also provide mechanisms for consultation. The Zuni Tribe sees these concerted efforts to protect places of importance to its traditions and culture, other than archeological sites, as positive progress.

The Zuni Tribe has a number of concerns, however, about the present traditional cultural property consultation structure. Because Section 106 compliance is performed when the final project area has been selected, we often find ourselves in a reactive and mitigative mode regarding the protection of places that have significance to the tribe. We believe that any project requiring NEPA compliance, especially an Environmental Impact Statement, should make a major effort to assess the potential impact to traditional cultural properties while alternatives are being explored. This may help to eliminate difficult choices for the tribe during the Section 106 process. As we noted above, the time frames for Section 106 compliance are often incompatible with the time frames of the tribe. More flexibility in agency time frames would be a great help to the tribe, especially given that Zuni has at least 100 religious leaders, many of whom may need to be contacted for any one compliance activity.

We are somewhat dismayed to have been told by some agencies that, in their opinion, some projects do not require fieldwork if the tribe does not know of any existing traditional cultural properties in a project area. Surely this would not be considered an option if archeologists said that no sites were known in an area? We are convinced that if this were the case archeologists would find no known sites in the project area to be a perfectly reasonable justification for conducting an inventory. We do not understand why unknown traditional cultural properties should be treated any differently than other unknown historic properties.

In part, we believe, this position is a result of some confusion among non-Zunis about what constitutes a traditional cultural property and what this may mean in terms of properties that are significant to the ongoing traditions and culture of the Zuni Tribe. For example,

while some named places may feature prominently in Zuni oral tradition, it is not necessary for the actual geographic location of these places to be known by tribal members. The fact that these places are known through oral tradition and that their general, but not specific, geographic location is known is perfectly appropriate to the tribe, so long as these places are not threatened by destruction. Once an undertaking threatens such a traditional cultural property however, the tribe has major concerns. Consequently it is critical that fieldwork be conducted in areas of undertakings to determine whether or not the specific geographic location of a generally located traditional cultural property is within that area of undertaking.

[Editor's note: In this example, there is a known traditional cultural property in the general area of a development project. Even though the exact location may not be known, the evidence of its existence in the oral traditions is very strong. In such cases, field work is not only appropriate, but essential to identifying the location of this property and ensuring that effects to it will be taken into account by the federal agency. The issue between the Zuni Archaeology Program and New Mexico SHPO is whether field work by the Zuni advisory team should be required when there are no oral traditions concerning traditional cultural properties in a particular project area.]

It must also be clearly understood that not all traditional cultural properties require use for them to have significance to the ongoing traditions and culture of the tribe. In fact some traditional cultural properties should not be visited by tribal members. Other properties do not need to be regularly or even intermittently used to have significance to the culture of the Zuni Tribe. Many trails and shrines, for example, that may not have been used for centuries still have spiritual links to the ongoing traditions and culture of the tribe.

We would also like to note that the standard practice of having archeologists perform traditional cultural property surveys is not always in the best interests of the tribe or the agency. We find the notion of archeologists performing anthropological fieldwork as strange as expecting that any cultural anthropologist is fully qualified to perform archeological fieldwork. If the tribe requires that a cultural anthropologist be hired to perform traditional cultural property compliance surveys, then we see no reason why such a qualified individual should not be hired or contracted by the agency or sponsor. For some years after the passage of the National Historic Preservation Act in 1966, very few agencies had full time archeologists on staff, and it has taken many years for archeology to be recognized as a specialized discipline requiring full-time professionals within agencies. We hope that this process will not take as long for qualified anthropologists, and we look forward to the day when all agencies provide traditional cultural properties equal consideration to that presently given to archeological sites.

Delineating boundaries for traditional cultural properties can be a serious logistical problem for the tribe, even though we recognize some need of this for management purposes. In certain cases, drawing boundaries around a traditional cultural property is neither feasible nor culturally appropriate; offering places that have connection with other areas cannot be separated from one another. For example the Zuni Salt Lake, which is located 65 miles

south of Zuni, is one of the most important traditional cultural places to the Tribe. Because the spiritual linkage between Zuni Salt Lake and Zuni acts as an umbilical cord to the Zuni people we do not know how boundaries can be established. In the Zuni world view the links between the Salt Lake and Zuni preclude drawing boundaries around this extremely important traditional cultural place.

The tribe is extremely concerned about the confidentiality of proprietary information. Despite the tribe's system for controlling confidential information, we are concerned that, in order for the appropriate agencies to assess and evaluate a traditional cultural property, the tribe may be required to provide more information about a place than the tribe feels comfortable providing. Given federal and state laws on the freedom of information, we are not fully comfortable providing agencies with confidential information. If we do not provide adequate information, however, the eligibility of the property to the National Register cannot be determined, and therefore it may lose any possible protection it would otherwise have had through the Section 106 process.

On the other hand we are all too aware that federal and state agencies cannot guarantee the protection of these properties even with such additional information. This puts the Tribe in an extremely awkward situation. Often the protection of a traditional cultural property under the Section 106 process may require the release of confidential information, which in itself diminishes the power and significance of the place to the tribe. When faced with a dilemma such as this the tribe may decide that it is more culturally appropriate to say nothing and risk the destruction of the traditional cultural property rather than divulge proprietary information.

The evaluation of a traditional cultural property's significance through a process of consultation between the agency and State Historic Preservation Office is difficult

for the tribe to accept. We do not understand how a place of significance to the tribe, as it has been identified by the tribe, could possibly be considered any further by any other entity. It is our opinion that only those people to whom the place is significant can possibly make a determination of significance for a traditional cultural property. [Editor's note: It is not the significance of the property to the tribe that is the subject of consultation between the agency and SHPO; that is a subject on which we have no expertise. Rather, the consultations concern the eligibility of the property to the National Register of Historic Places, a very specific question involving criteria defined in federal regulations.]

Mitigation of impact, a common way of dealing with historic properties, is often not an option for traditional cultural properties. The only known culturally acceptable way to mitigate impact for most traditional cultural properties is not to have any impact at all by avoiding the property, and thus providing for its protection. Mitigation of impact to a traditional cultural property is truly a western concept that has no place in the traditional Zuni world view.

While traditional cultural property consultation under Section 106 of the National Historic Preservation Act is a step forward in providing protection for places important to the ongoing culture and traditions of the Zuni Tribe, from a tribal perspective this consultation process is not an adequate compromise between the needs of the dominant society and the needs of Zuni society. All too often the tribe finds itself reacting to what the tribe sees as untenable situations where traditional cultural properties are threatened by undertakings.

In general the tribe finds that the consideration of traditional cultural properties provided under the Section 106 of NHPA occurs far too late in the planning for an undertaking. Traditional cultural properties should be considered when there are still alternatives to the undertaking. By the time the agency begins the Section 106 process, the decision to proceed with a project has usually been finalized. At that point, historic properties are dealt with through avoidance, at best, or most commonly, through a program of treatment designed to mitigate the effects of the undertaking on those properties. The tribe knows of no way to mitigate impact to a traditional cultural property that is to be affected by an undertaking. Consequently, from the perspective of the Zuni Tribe, it would be much more appropriate for agencies and developers to consider traditional cultural properties when the feasibility of projects is being initially considered. In this way more equity can be developed between the dominant society's needs and those of the Zuni Tribe.

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Representatives of the Zuni, Acoma, and Hopi tribes and the Ramah band of Navajos consult with the Bureau of Land Management and the U.S. Geological Survey at Zuni Salt Lake, March 10, 1992. Photo by T.J. Ferguson, Institute of the North American West.